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Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School) [2016] NIQB 52

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Case notes

Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School) [2016] NIQB 52

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Introduction

For almost 120 years the legal doctrine of *in loco parentis* has been recognised by some judges as providing a useful benchmark for the standard of care owed by teachers to pupils under their charge.[1] In the recent case of *Murray v McCullough*,[2] the opening argument of counsel for the plaintiff/claimant 'contended that the duty of a schoolteacher is *to take such care of his pupils as would a reasonably careful parent of the children of the family*'.[3] The High Court judgment, delivered on 8 June 2016, cites with approval commentary on this issue from *Charlesworth and Percy on Negligence*,[4] the authorities highlighted drawn from a chapter more generally focused on 'Persons Professing Some Special Skill'.[5] Significantly, Stephens J makes plain the limitations of referring to a 'parent' or 'prudent father' when defining the scope of the duty incumbent upon (specialist) teachers. This straightforward approach, by concentrating on the 'fundamental and simple proposition that the standard is *to take reasonable care in all the circumstances*',[6] will be contended to be sensible, instructive and, consistent with more recent decisions of the higher courts. Nonetheless, in the specific context of sports negligence cases, identifying the crucial material factors 'in all the circumstances' may prove challenging and problematic. Accordingly, this case note suggests that in unpacking and scrutinising the totality of circumstantial considerations, application of legal principles derived from 'sports law' jurisprudence provides courts in such cases with valuable and necessary guidance.

Facts

Whilst representing her school in a first-eleven match on 6 December 2008, the plaintiff suffered serious dental injuries, and a cut to her lip, when she was struck with a hockey stick. Following medical evidence, the court accepted that had the plaintiff been wearing a mouth guard, the damage to her teeth would have been prevented. The plaintiff's case

1 E.g. *Williams v Eady* (1893) 10 TLR 41; *Wilkin-Shaw v Fuller* [2012] EWHC 1777, [39] per Owen J.

2 *Murray v McCullough (as Nominee on Behalf of the Trustees and on Behalf of the Board of Governors of Rainey Endowed School)* [2016] NIQB 52.

3 Ibid [4].

4 C T Walton (ed), *Charlesworth and Percy on Negligence* 13th edn (Sweet & Maxwell 2014) [9-187].

5 Ibid [9-01]–[9-343].

6 *Murray* (n 2) [5].

was that the wearing of mouth guards ought to have been mandatory; that she was not sufficiently warned of the risks of not wearing a mouth guard; and that her parents were not sufficiently warned regarding the risks of not wearing a mouth guard. The defendants contended that they had discharged their obligation to take reasonable care in the circumstances by recommending to the plaintiff and her parents the use of mouth guards and by giving sufficient warnings. Common practice in other schools, guidelines published by responsible bodies, including various National/International Governing Bodies for Hockey (NGBs), and content from the 'Safe Practice in Physical Education and Sport' publication were called in aid by the defendants to demonstrate that they had fulfilled the appropriate standard of care.

Legal principles

In short, the determinative legal issue in this case concerned the law of negligence's control mechanism of breach, requiring the court to establish the standard of reasonable care (and skill) required in the specific circumstances. Consistent with the legal doctrine of *in loco parentis*, counsel on behalf of the plaintiff submitted that the test adopted in *Williams v Eady*, that of the careful parent, should be regarded as informative.[7] In forcefully dismissing this submission, Stephens J insightfully observes:

> . . . for my own part I would prefer that the standard of the duty of a schoolteacher should not be expressed as taking such care of his pupils as would a reasonably careful *parent* of the children *of the family* but rather taking reasonable care in all the circumstances. The yardstick is reasonable care; it is not some notional standard as to what a reasonably careful and prudent *parent of the family* would or would not do in relation to his *own children*.[8]

The High Court regarded the circumstances ordinarily to be considered in such a case, when fashioning the legal test to be applied, as typically including: the age and maturity of the plaintiff;[9] the tendency for children to sometimes fail to appreciate the magnitude of risk and ignore/forget safety advice, it being necessary to balance such factors against the fostering and growth of personal autonomy and the cost of preventative measures;[10] and the standard practice adopted in other schools and whether this might be viewed as universal and logically justifiable.[11] Arguably, a particular circumstance perhaps worthy of more pronounced acknowledgment by the court, since it further contextualises and distinguishes the respective duties of parent(s) and physical education (PE)/sport teacher(s), would have been explicit recognition that the case before it was an instance of (alleged) professional negligence.[12] Moreover, application of legal principles derived from 'sports law' jurisprudence may have been of considerable practical utility to the court when unpacking the crucial material factors from the full circumstances of this individual case.

Decision

The court accepted that the defendants had sent the plaintiff a 'School Uniform Code' every year which recommended the wearing of mouth guards by pupils for their own

7 Ibid [4].

8 Ibid [5].

9 Ibid [6]–[7].

10 Ibid [8]–[9].

11 Ibid [10]–[11].

12 See Walton (n 4) [9-187], recognising that the standard of care in such cases is typically approached by reference to the *Bolam* test (see n 17). See further, N Partington, 'Professional Liability of Amateurs: The Context of Sports Coaching' (2015) 4 Journal of Personal Injury Law 232.

protection, as advised by the (International) Hockey Federation (FIH). Indeed, there appeared a consensus on the guidance issued by NGBs, and the Safe Practice Publication, there being no requirement for the mandatory wearing of mouth guards in 2008. Accordingly, in finding the approach of the defendants to be consistent with the standard procedure at schools in Northern Ireland, it fell for the court to decide 'whether the standard generally applied was sufficient to discharge the duty of care in relation to the plaintiff who was 15 at the time of the incident'.[13] On this, Stephens J ruled in the affirmative, the judgment ultimately concluding that sufficient warnings had been made to bring the dangers of not wearing a mouth guard to the attention of both the plaintiff and her family. There were no grounds for a finding of liability in negligence against the defendants.

Comment

Sports negligence cases are highly fact-sensitive and context specific.[14] Emphasis by the court on the particular circumstances of this individual case is to be expected. More specifically, robust recognition of the unsuitability and considerable limitations of the doctrine of *in loco parentis* in such a case is both welcome and necessary, not least, given the emerging case law in this area.[15]

The teaching of PE, and coaching of sport, requires a specialist skill not ordinarily possessed by the average reasonable parent.[16] The test for negligence in such circumstances 'is the standard of the ordinary skilled man exercising and professing to have that special skill'.[17] Simply applied, *Murray v McCullough* represents an instance of professional liability. Subsequently, careful consideration of what might amount to regular practice, approved by a responsible body and being capable of withstanding logical scrutiny, underscores application of legal principles derived from professional negligence by the court.[18] This is a fundamental circumstance of this particular case. Moreover, it makes problematic reference to a 'prudent parent' when defining the standard of care incumbent upon the defendants. As succinctly articulated by Lord Justice Croom-Johnson when *Van Oppen v Clerk to the Bedford Charity Trustees*[19] was considered by the Court of Appeal:

> The background to the case is that the duty of care which the school owes to its pupils is not simply that of the prudent parent. In some respects it goes beyond mere parental duty because it may have special knowledge about some matters which the parent does not or cannot have. The average parent cannot know of unusual dangers which may arise in the playing of certain sports, of which rugby football may be one. That is why the school undertakes to see that proper coaching and refereeing must be enforced. It might know that some types of equipment in, for example, gymnastics have their dangers. But this is all part of

13 *Murray* (n 2) [20].

14 N Partington, 'Legal Liability of Coaches: A UK Perspective' (2014) 14(3–4) International Sports Law Journal 232, 241–42.

15 E.g. *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135; *Mountford v Newlands School* [2007] EWCA Civ 21; *Woodbridge School v Chittock* [2002] EWCA Civ 915; *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA).

16 N Partington, 'Sports Coaching and the Law of Negligence: Implications for Coaching Practice' (2016) Sports Coaching Review 1–21, 6 DOI 10.1080/21640629.2016.1180860.

17 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (QB), 586 per McNair J.

18 E.g. ibid; *Bolitho (Deceased) v City of Hackney Health Authority* [1998] AC 232 (HL).

19 *Van Oppen* (n 15).

> the duty placed on the school to take reasonable care of the safety of the person and property of each pupil.[20]

More recently, Lady Hale in the Supreme Court in *Woodland v Swimming Teachers Association*[21] reinforced the limitations of attempts to apply the notion of *in loco parentis* in the educational context when stating, 'it is not particularly helpful to plead that the school is *in loco parentis*. The school clearly does owe its pupils at least the duty of care which a reasonable parent owes to her children. But it may owe them more than that.'[22]

These dicta offer considerable support to the approach adopted by Stephens J in *Murray v McCullough*. The teaching and coaching of hockey requires the exercise of a special skill. This demands a higher standard of care or, in adopting the words of Lady Hale, 'more than' what might be expected of a reasonable parent. A reasonable parent would not generally be required to possess the necessary level of competence, qualifications and/or experience to operate properly and safely in the same circumstances. Accordingly, in endorsing the reasoning of the High Court in *Murray v McCullough*, it is submitted that reference to terminology embracing the concept of the reasonably careful parent, in instances of professional negligence, is somewhat artificial, restrictive and, ultimately, out-dated and best resisted.[23]

More generally, *Clerk and Lindsell on Torts* highlights the judiciary's avoidance of reducing 'to rules of law the question whether or not reasonable care has been taken',[24] with citation of authority discouraged as a means of clarifying reasonable care given the uniqueness of particular situations.[25] Indeed, as noted by Judge LJ in the sports negligence case of *Caldwell v Maguire*, 'the issue of negligence cannot be resolved in a vacuum. It is fact specific.'[26] By mainly concentrating on the 'Factual Background' in *Murray v McCullough*,[27] the approach of Stephens J appears to largely concur with these observations. Nonetheless, it has been suggested that '[i]n law context is everything',[28] there being a body of relevant and well-established 'sports law' jurisprudence intended to prove instructive when sports negligence cases come before the courts.[29]

For instance, when sitting in the same High Court of Justice in Northern Ireland in 2012, (the then) Gillen J, in *Morrow v Dungannon and South Tyrone BC*,[30] framed determination of the standard of care required by a fitness instructor as follows:

> In arriving at the standard appropriate in any given case the court will take into account the prevailing circumstances including the sporting object, the demands made upon the participant, the inherent dangers of the exercise, its rules, conventions and customs, the standard skills and judgment reasonably to be expected of a participant and the standards, skills and judgment reasonably to be

20 Ibid 414–15 Croom-Johnson LJ.

21 *Woodland v Swimming Teachers Association* [2013] UKSC 66.

22 Ibid [41].

23 See generally Partington (n 14).

24 M A Jones (ed), *Clerk and Lindsell on Torts* 21st edn (Sweet & Maxwell 2014) [8-143].

25 Ibid.

26 *Caldwell v Maguire* [2001] EWCA Civ 1054, [30].

27 *Murray* (n 2) [12]–[27].

28 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [28] per Lord Steyn.

29 E.g. *Caldwell* (n 26); *Smolden v Whitworth* [1997] PIQR P133 (CA); *Vowles v Evans* [2003] EWCA Civ 318; *Condon v Basi* (1985) 2 All ER 453 (CA).

30 *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50.

> expected of someone such as the defendant and Mr Taffee in instructing monitoring and supervising the plaintiff.[31]

Whilst it is clear that the above propositions, originally fashioned in *Caldwell v Maguire*,[32] require appropriate amendment to reflect often quite different sporting circumstances,[33] they undoubtedly afford guidance to courts in sports negligence cases by focusing on crucial material factors derived from the totality of circumstances. Simply applied, they allow for a more nuanced and precise legal test by more effectively contextualising sports negligence cases. As such, by explicitly accounting for the interaction between the law of negligence and sport, particular propositions directly in point in *Murray v McCullough* would appear to include: the inherent dangers of hockey; the rules, conventions and customs involved in playing hockey at first-eleven school standard for under-16s in 2008; the standard skills and judgment reasonably to be expected of the plaintiff with regard to wearing a mouth guard and appreciating the risks of not doing so; and the standards, skills and judgment reasonably to be expected of the defendants in instructing, monitoring, supervising and warning the plaintiff of the general risks involved in playing hockey and the specific dangers generated by not wearing a mouth guard. In future possible sports negligence cases, these propositions will likely prove instructive to courts when crystallising the standard of care incumbent upon PE teachers, fitness instructors and/or sports coaches. By continuing to explicitly recognise and account for the application of ordinary tort law principles in the special circumstances of sport, this would no doubt further contribute to the emerging and distinctive body of 'sports law' jurisprudence.

31 Ibid [20].

32 *Caldwell* (n 26) [11].

33 Significantly, *Caldwell* relates to the duty of care owed by professional jockeys to fellow athletes in elite competitive sport. Therefore, although the legal duty of reasonable care is applicable, as noted by Lord Bingham in *Smoldon v Whitworth* when distinguishing between the duties of a referee in relation to the players and that of a participant in a contest in relation to a spectator: 'the practical content of the duty differs according to the quite different circumstances' (*Smoldon* (n 29) 139).